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No. 90-845

In the Supreme Court of the United States

OCTOBER TERM, 1990

ERROL MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether exigent circumstances justified the warrantless entry into an apartment used by petitioner and his accomplices as a place to sell drugs.

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OPINIONS BELOW

The opinion of the court of appeals en banc, Pet. App. 1a-25a, is reported at 916 F.2d 766. The earlier opinion of the panel is reported at 893 F.2d 482.

JURISDICTION

The judgment of the court of appeals en banc was entered on October 1, 1990. The petition for a writ of certiorari was filed on November 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and

co-defendant Paul Thomas were convicted of possessing cocaine with the intention to distribute it, in violation of 21 U.S.C. 841(a)(1), and carrying a firearm during the commission of a drug trafficking offense, in violation of 18 U.S.C. 924(c). Petitioner was sentenced to consecutive terms of 51 months' imprisonment on the possession offense and five years' imprisonment on the firearms offense, to be followed by a five-year period of supervised release. The court of appeals affirmed Thomas's conviction, but a divided panel reversed petitioner's conviction after holding that it rested on evidence seized in violation of the Fourth Amendment. The en banc court of appeals vacated the panel's Fourth Amendment holding and held that seizure of the evidence was justified by exigent circumstances. It therefore affirmed petitioner's conviction.

1. A confidential informant reported that narcotics were being sold at Apartment 1-O, on the first floor of an apartment building at 321 Edgecombe Avenue in Manhattan. On the evening of September 8, 1988, agents of the New York Drug Enforcement Task Force conducted surveillance at that address. They observed a steady stream of cars stop while passengers briefly visited the apartment building. One agent followed several visitors inside the building and saw them enter Apartment 1-O for two or three minutes and then leave. Pet. App. 3a-4a; Gov't C.A. Br. 4.

Some of the agents followed one of the cars as it left 321 Edgecombe and stopped it several blocks away. The occupants of the car said that armed men were selling cocaine and marijuana in Apartment 1-O and that they were not limiting their sales to past customers. Gov't C.A. Br. 5.

At 9:50 p.m., one of the agents attempted to make a controlled purchase. He knocked on the door of Apartment 1-O and was admitted. Inside the apartment he saw six men, including Thomas and petitioner. Thomas was sitting by

the door holding a cocked pistol that was pointed at the floor but in the agent's direction. Petitioner was sitting on a couch counting a large stack of money. Next to him was a .357 magnum revolver. A large quantity of cocaine and marijuana lay on a couch and a table. Pet. App. 4a; Gov't C.A. Br. 5-6.

The agent told the man who had admitted him that he wanted $5 worth of marijuana. Another man handed the agent a small bag of marijuana. The agent paid him with a $5 bill whose serial number had been recorded. The agent left the apartment and reported his observations to the other Task Force agents. Pet. App. 4a; Gov't C.A. Br. 6.

About ten minutes later, an agent knocked on the door of the apartment and announced his identity. The agents standing by the door heard sounds of shuffling feet inside the apartment and received a radio call from agents outside the building that the suspects were trying to escape through a bathroom window. Pet. App. 4a-5a; Gov't C.A. Br. 6.

The agents forced their way into the apartment. They found one man hiding in a closet and four, including petitioner and Thomas, in the bathroom trying to escape through a window. In plain view the agents saw two loaded weapons, a large quantity of cocaine and marijuana, narcotics paraphernalia, packaging materials, and several thousand dollars in cash. The unidentified sixth man—the one who had sold the marijuana to the undercover agent—escaped. Pet. App. 5a; Gov't C.A. Br. 6-7.

2. Before trial, petitioner moved to suppress the evidence seized as a result of the agents' entry into Apartment 1-O. Petitioner claimed that the entry was illegal because the agents had no warrant. The government contended that exigent circumstances excused the absence of a warrant. The district court agreed with the government and denied the suppression motion. Pet. App. 5a-6a.

A divided panel of the court of appeals reversed petitioner's conviction. The majority held that the circumstances were not exigent because there was no urgency to enter the apartment until the agents knocked on the door. 893 F.2d at 486-491. The dissenting judge maintained that the totality of the circumstances established a need for immediate action and that the officers did not manufacture the exigency by knocking on the door. *Id.* at 491-493.[1]

3. The en banc court of appeals reheard the issue that had divided the panel and affirmed petitioner's conviction. Pet. App. 1a-25a; see *id.* at 3a n.1. The majority held that the district court had not committed clear error in finding exigent circumstances. *Id.* at 7a. Applying the multi-factor balancing test suggested in *Dorman* v. *United States*, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc), Pet. App. 7a-8a, the majority determined that "all the *Dorman* factors were present" and that "the district court's determination was far from clearly erroneous," *id.* at 9a. In particular, the majority found that the offenses under investigation were grave, the suspects were armed with loaded, semi-automatic weapons, the agents had first-hand knowledge of the crimes, the suspects were in the apartment and might escape if not swiftly apprehended (as one did), and the agents acted lawfully by attempting to make a peaceful entry. *Ibid.*

In addition to the *Dorman* factors, the majority cited several other reasons why the circumstances were exigent. Pet. App. 9a-10a. Those reasons included the immediate public danger presented by the presence of loaded weapons and ongoing drug trafficking inside an apartment building, the urgent need to preserve evidence in the face of information that the suspects had access to another unidentified apartment in the same building, the possibility of losing the

[1] The panel unanimously affirmed co-defendant Thomas's conviction because he lacked a legitimate expectation of privacy in Apartment 1-O. 893 F.2d at 483-484.

prerecorded $5 bill, the ease with which the drugs could be flushed down a toilet, the danger to the public during the period necessary to obtain a warrant, and the difficulty of obtaining a warrant quickly in the middle of the night, while the apartment continued to serve as an outlet for retail drug sales. *Ibid.*

The majority rejected petitioner's contention that the agents manufactured the exigent circumstances by knocking on the door and announcing their presence. Pet. App. 11a-15a. First, the majority sustained "the district court's finding that exigent circumstances existed prior to the knocking." *Id.* at 11a. Second, the majority reasoned that since "the agent who made the undercover purchase would have been entitled to arrest the suspects in the apartment at the time of the purchase," the agent did "not need a warrant to reenter the apartment within ten minutes, having exited only to secure proper protection by obtaining reinforcements." *Ibid.* Third, the majority pointed out that the officers acted according to law, which permits an attempt to make a peaceful entry. *Id.* at 11a-12a.

Judge Kearse, joined by Chief Judge Oakes and Judge Feinberg, dissented. Pet. App. 16a-25a. They maintained that exigent circumstances did not exist before the agents announced their presence and that knocking on the door to the apartment impermissibly manufactured the emergency. *Ibid.*

ARGUMENT

The en banc court of appeals applied the correct legal standard to the undisputed facts of this case. Its determination that the district court's "fact-specific" (Pet. App. 7a) finding of exigent circumstances was not clearly erroneous is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The en banc court of appeals' decision is consistent with this Court's decision last Term in *Minnesota* v. *Olson*, 110 S. Ct. 1684 (1990). In *Olson*, this Court held that the state court "applied essentially the correct standard in determining whether exigent circumstances existed" when that court observed that a warrantless entry is justified by, inter alia, "imminent destruction of evidence, * * * the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *Id.* at 1690. This Court added that, as the state court had noted, "the gravity of the crime and the likelihood that the suspect is armed should be considered." *Ibid.* On the facts of *Olson*, the Court was "not inclined to disagree with [the state court's] fact-specific application of the proper legal standard." *Ibid.*

Like the state court in *Olson*, which relied on the *Dorman* factors for determining the presence of exigent circumstances, *Minnesota* v. *Olson*, 436 N.W. 2d 92, 97 n.1 (Minn. 1989), the court of appeals here found exigent circumstances under the *Dorman* test, Pet. App. 7a-9a. It sustained the district court's findings that the agents had first-hand knowledge of a grave violation of the narcotics laws by six suspects armed with semi-automatic weapons.[2]

At the time of the undercover purchase, the agent inside the apartment had only three options: (1) draw his weapon and arrest the suspects; (2) stake out the residence while a

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[2] Petitioner errs in stating that the decision below is the first to approve a warrantless entry based upon the type of crime or the presence of weapons. Pet. 4. This Court in *Olson* spoke approvingly of the state court's consideration of "the gravity of the crime and the likelihood that the suspect is armed." 110 S. Ct. at 1690. In *Welsh* v. *Wisconsin*, 466 U.S. 740, 753 (1984), this Court stated that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."

search warrant was obtained (a process that the district court determined "would have taken a matter of hours," C.A. App. 157); or (3) leave the apartment and reenter with reinforcements. The first option would have invited a shoot-out with the suspects, who outnumbered the agent six to one. The second option carried the risks that the stake-out would be discovered, that the contraband would be sold, or that the marked money would be given out as change. The third option was the only sensible one under the circumstances. As the district court and the court of appeals correctly determined, the Fourth Amendment did not require the agent either to beat the suspects to the draw or to let them vanish into the night while he attempted to obtain a warrant. To the contrary, the circumstances were sufficiently exigent to justify an immediate, warrantless reentry into the apartment.

2. Petitioner contends that the court of appeals' decision "obliterat[es]" the Fourth Amendment warrant requirement and signals that in the future police need only have probable cause and knock on the door in order to enter a dwelling without a warrant. Pet. 4. Petitioner's contention is simply another way of asserting that the agents manufactured exigent circumstances in this case. The facts of this case belie that contention.

a. The en banc court of appeals correctly sustained "the district court's finding that exigent circumstances existed *prior to* the knocking" and warrantless entry into the apartment. Pet. App. 11a (emphasis added). Although the court of appeals pointed to a number of such circumstances, *id.* at 9a-10a, three of them deserve particular note.

First, the agents could well surmise that their surveillance would be reported by the occupants of the car the agents stopped during the evening. Although the stop itself occurred out of sight of the apartment, the agents could not safely assume that the occupants would not subsequently

telephone the apartment and tip off their suppliers to the agents' presence.

Second, allowing the suspects to go about their "business as usual" would have resulted in the sale of much if not all of the contraband and perhaps the loss of the prerecorded $5 bill if it was given out as change in a subsequent transaction. Thus, even if the suspects had remained open for business until the agents obtained a warrant, the ongoing transactions might well have reduced or eliminated the evidence against them.

Third, there was a substantial risk that the suspects would leave the apartment before a warrant could be obtained. It was already 10 p.m. by the time the agent made the controlled purchase. As the district court found, at least two more hours would have passed before the agents could have obtained a search warrant by telephone. In that circumstance, there was a real risk that the suspects would close up shop and that the police would lose their opportunity to seize the evidence and arrest the suspects.

b. Even if exigent circumstances did not exist prior to the agents' knock on the apartment door, the police officers' reentry into the apartment shortly after the undercover agent's departure was not unreasonable on the ground that it was effected without a warrant.

The agent's initial entry into the apartment on the pretense that he was a bona fide customer was lawful and did not require the authority of a warrant. See *Lewis* v. *United States*, 385 U.S. 206, 211 (1966).[3] Once lawfully in the apart-

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[3] As the Court reasoned in *Lewis*:

> Without question, the home is accorded the full range of Fourth Amendment protections. But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner

ment, the agent could properly see and hear anything revealed by the suspects, including the drugs and guns in his plain view. See *id.* at 210. In light of his first-hand observations, "there is no doubt that the agent who made the undercover purchase would have been entitled to arrest the suspects in the apartment at the time of the purchase." Pet. App. 11a.

Because the agent could have stayed, arrested the suspects, and seized the contraband and guns in plain view, the immediate reentry with reinforcements was merely a "continuation of the first" entry and like it did not require a warrant. See *Michigan* v. *Tyler*, 436 U.S. 499, 511 (1978) (warrantless reentries "were no more than an actual continuation of the first [entry to extinguish fire], and the lack of a warrant thus did not invalidate the resulting seizure of evidence [of arson]"); cf. *Michigan* v. *Clifford*, 464 U.S. 287, 296-297 (1984). As the court of appeals held, "[i]t follows that the undercover agent here did not need a warrant to reenter the apartment within ten minutes, having exited only to secure proper protection by obtaining reinforcements. This is not the kind of scenario that needs the detached judgment of a neutral magistrate to determine whether there is probable cause for an arrest and search." Pet. App. 11a.

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as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. * * *

385 U.S. at 211.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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